JAMES FUNK,

vs.

GEORGE FUNK, et. al.

BILL FOR PARTITION,

INVOLVING LEGITIMACY.

ARGUMENT,

BY WELDON, TIPTON & BENJAMIN,

Of Counsel for Complainant.

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JAMES FUNK,
vs.
GEORGE FUNK. et al. } Bill for Partition.

ARGUMENT FOR COMPLAINANT.

The main question involved in this case is, whether or not Isaac Funk was married to the mother of James Funk, the complainant.

In determining this question it will be well to consider before investigating the facts of the case:

1. What constitutes a Valid Marriage; and,

2. The character and extent of the presumption in favor of marriage, which, (in analogy to the presumption of innocence in a criminal case,) is to be entertained by a court or jury, whenever the effect of sustaining the marriage would legitimate a recognized and acknowledged child.

I.

WHAT CONSTITUTES A VALID MARRIAGE.

By the term *marriage* we mean the *contract* by which the marriage relation is entered into. The relation itself is properly designated by the words *status of marriage*. We concede that the *status* is a matter *publici juris*, subject to the public will, and not to that of the parties, in respect to legal rights and consequences attaching thereto, and that it is often and properly called a civil institution, inasmuch as it is a fundamental domestic relation, affecting the welfare of the community, and can be dissolved only by authority of the State. But to constitute the *status* there must first be a contract. And our present enquiry is confined to the nature of this contract at common law. Upon this question the authorities are nearly unanimous.

Lord Holt says: "If the parties contract that they are man and wife; or each that, 'I marry you,' it amounts to an actual marriage; it is as much a marriage, in the sight of God, as if made *in facie ecclesiæ*."

(Collins v. Jesser, Holt Rep. 458.) Quoted in Londonderry v. Chester, 2 N. H. 279.

Lord Kenyon says, "that an agreement of marriage between the parties, *per verba de præsenti* was *ipsum matrimonium.*"

(Reed v. Passer, Peake Cas. 232.) Quoted in Newbury v. Brunswick, 2 Vt. 160.

Mr. Jacobs (tit. marriage) says: "Nothing more is necessary to complete a marriage by the laws of England, than a full, free, and mutual consent between the parties."

Quoted in Potier v. Barclay, 15 Ala. 449; also in Jackson v. Winne, 7 Wend. 50.

In the former case the court add; "It is clear that the *vinculum matrimonii*, is the consent freely given by the parties competent to contract. *Nuptias, non concubitas sed consensus facit*, is a maxim both of the civil and common law." 15 Ala. 449.

"If the contract be *per verba de præsenti*, the marriage is complete; and if the parties, being in other respects competent to contract, and not being influenced by fraud or force, employ such words, they become by the operation of the contract alone, husband and wife, and are liable to the duties of their new relation."

Londonderry v. Chester, 2 N. H. 279.

"No formal solemnization of marriage was requisite. A contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is as valid as if made *in facie ecclesiæ.*"

Fenton v. Reed, 4 Johns, 54.

"The principles of the common law respecting marriage, are few and simple. It requires no ceremony, no solemnization by minister, priest or magistrate. A marriage is complete when there is a full, free and mutual consent by the parties capable of contracting, even when not followed by cohabitation. * * * Such was the simplicity of the law throughout Christendom on the subject of marriage, that before the time of Pope Innocent the 3d, who died in 1216, there never had been any solemnization of marriage; but the man went to the house inhabited by the woman, and led her away to his own house. This was the only ceremony then used."

Caujolle v. Ferrie, 26 Barb. 184–5; Londonderry v. Chester, 2 N. H. 278.

The first English marriage act, commonly called Lord Hardwick's, (26 Geo. 2, ch. 33, A. D. 1753,) required marriages to be

celebrated in a Parish Church, by banns, or by license, and declared all other marriages, with certain exceptions, to be void. It never applied to the colonies and had no force in this country.

Cheney v. Arnold; 15 N. Y. 349.

In Lautour v. Teesdale and Wife, the question was whether the defendants were legally married at Madras, in the East Indies, in 1808. In delivering the opinion of the Court Lord Chief Justice Gibbs says:

"Now, British subjects settled at Madras are governed by the laws of this country which they carry with them, and are unaffected by the laws of the natives. The question therefore is, whether by the laws of this country, to which they alone are subject, and by which alone their actions are to be governed, this marriage was legal. In this country we judge of the validity of a marriage by what is called the marriage act, but as that statute does not follow subjects to foreign settlements, the question remains whether this would have been a valid marriage here before that act passed. The important point of the case, viz., what the law is by which such a question is to be governed, was most ably and fully discussed in the case of *Dalrymple* v. *Dalrymple*, which has been so often alluded to; and the judgment of *Sir William Scott* has cleared the present case of all the difficulty which might, at a former time, have belonged to it. From the reasonings there made use of, and from the authorities cited by that learned person, it appears that the canon law is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place. From that case and from those authorities, it also appears that, before the marriage act, marriages in this country were always governed by the canon law, which the defendants, therefore, must be taken to have carried with them to Madras. It appears also, that a contract of marriage, entered into *per verba de præsenti*, is considered to be an actual marriage; though doubts have been entertained whether it be so, unless followed by cohabitation. * * * * * It follows from what I have stated, that this was a legal marriage; since it was a marriage between British subjects, celebrated in a British settlement, according to the laws of this country, as they existed before the marriage act; and which, if it

had been celebrated here before that statute, would have been valid."

8 Taunton, 836–7 (4 Eng. C. L. 405.)

In Jewell v. Jewell, 1 How. (U. S.) 234, the Circuit Court instructed the jury, "that if the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage." Upon this instruction the Supreme Court were equally divided. And we readily concede that the instruction, as a whole, was erroneous, because it asserted that a contract *per verba de futuro cum copula* is a valid marriage; and the late authorities hold that a contract to marry in the future, followed by carnal intercourse, is not a marriage.

Cheney v. Arnold, 15 N. Y. 345.

Duncan v. Duncan, 10 Ohio St. 181.

But in the latter case the Court add: "We desire that it shall be distinctly noticed that this case presents no question as to the validity of a marriage contract (otherwise than in accordance with the provisions of our statutes on that subject),*per verba de præsenti.*"

10 Ohio St. 183.

And in the former case the Court say: "With us marriage is simply a civil contract, differing it is true, from contracts upon other subjects in the circumstance that it is not in the power of the parties to release or dissolve it, but partaking in many other particulars of the nature of the common law contracts. It requires the existence of two parties, of different sexes, competent to contract, and an actual contract between them. Like other contracts, it may be in terms and intent executory or executed. *If executed, that is, if the parties agree* EO INSTANTI *to take each other for husband and wife, it is* IPSUM MATRIMONIUM. If executory in its terms it would not, by any analogy to common law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and, viewed as an agreement to marry, it confessedly does furnish the basis of an action for damages." 15 N. Y. 347-8.

While the Supreme Court of the United States in Jewell v. Jewell were equally divided upon an instruction which asserted that a contract *per verba de futuro cum copula* is a valid marriage,

it seems that they never doubted the common law validity of a marriage *per verba de præsenti;* for in the later case of Hallett v. Collins, they say: "That marriage might be validly contracted by mutual promises alone, or what were called *sponsalia de presenti*, without the presence or benediction of a priest, was an established principle of civil and canon law antecedent to the Council of Trent. See Pothier du Contrat de Marriage, Part II, c. I; Zouch, Sanchez, &c.; and Dalrymple v. Dalrymple, 2 Haggard's Consistory Reports, 54, where all the learning on the subject is collected.

"Whether such a marriage was sufficient by the common law in England, previous to the marriage act, has been disputed of late years in that country, *though never doubted here.* See the case of The Queen v. Millis, 10 Clark & Fin. 534.

"On the continent, clandestine marriages, although they subjected the parties to the censures of the church, were not only held valid by the civil and canon law, but were pronounced by the Council of Trent to be *vera matrimonia.* But a different rule was established for the future by that Council, in their decree of the 11th of November, 1563. This decree makes null and void every marriage not celebrated before the parish or other priest, or by license of the ordinary, and before two or three witnesses."

10 How. (U. S.) 181.

It will be borne in mind that the authority of the Council of Trent was never acknowledged either in England or in any portion of this country.

12 Ohio St. 557.

The question as to what constitutes a valid marriage in Ohio has recently been discussed by the Supreme Court of that State in the case of Carmichael v. State, 12 Ohio St. 553 decided at the December Term, 1861.

After stating that it was claimed by three of the six lords who sat in the case of the Queen v. Millis, that it was the ecclesiastical law of England, that a marriage without the benediction of the priest should not be a legitimate marriage, the court reason thus: "The Legislature (of Ohio) must have proceeded on the idea of the entire inapplicability of any such rule of the common law in this State, where ecclesiastical authority binds those only who render a voluntary submission, or, *as is more probable*, the rule of the

common law in the mind of the Legislature was that shown by the certainly prevalent opinion in England prior to the decision in the Queen v. Millis, and almost universally adopted in this country."

Id. 558.

The Court had already said in the same case, "there is no provision that there shall be no marriage unless solemnized as provided in the act (Marriage Act of Ohio), or that a marriage, unless so solemnized, shall be void. We are brought, then, to a rule of construction, which appears to be established by the authorities, that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity.* Bishop on Marriage and Divorce, Sec. 167, and cases cited. It is said by the Judge in Catterall v. Sweetman, 1 Rob. Ecc. Rep. 304, 317, 'so far as my research extends, it appears that there never has been a decision that any words in a statute, as to marriage, though prohibitory and negative, have been held to infer a nullity, unless that nullity was declared in the act.'"

12 Ohio St. 555.

The Court thereupon conclude: "We cannot construe our (Ohio) statute as restrictive and prohibitory, as invalidating what, by natural law, the general law of society, independent of statutory prohibition, would be regarded a valid marriage. 'Marriage,' said Lord Denman, 'being a civil contract flowing from the natural law, must be taken as lawful till some enactment which annuls it can be produced and proved by those who deny its lawfulness.' 10 Cl. & Fin. 806."

10 Ohio St. 558–9.

From this decision it appears to be clear that a marriage, in Ohio, good at the common law is good notwithstanding the existence in that State of "An Act Regulating Marriages," and notwithstanding the old ecclesiastical law claimed to exist by some of the Judges in Queen v. Millis. We are therefore brought back to the original question as to what constitutes a valid marriage at the common law, and this court is as competent to pass upon this and every other common law question as any court in Ohio or elsewhere.

It is not necessary for the complainant in this case to maintain

that a contract of marriage *per verba de præsenti* is a valid marriage when not followed by cohabitation. We have seen that it is stated in Lautour v. Teesdale that "doubts have been entertained whether it be so, unless followed by cohabitation." (8 Taunt. 837). And in Jewell v. Jewell, the instruction upon which the Court was equally divided, embraced not only the proposition that a contract made *per verba de futuro cum copula* is an actual marriage, (which according to the later cases was clearly erroneous,) but also the proposition "that if the contract be made *per verba de præsenti* and *remains without cohabitation*," it amounts to a valid marriage, (1 How. 233). Without conceding or believing that subsequent copulation is essential to a contract of marriage *per verba de præsenti* we readily perceive that the circumstance of the parties subsequently living together in the way of husband and wife is most important to show the intent and meaning of their contract. We cannot find better words to express our idea than those used by Lord Campbell in Queen v. Millis, where he says: "The use of the expression 'contract of marriage' is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean only an irrevocable engagement to be afterward carried into effect, the parties not meaning then to become husband and wife, and their engagement, therefore, though words in the present tense are used, not amounting to *nuptiæ*." "Be it even borne in mind," says Lord Brougham, in the same case, "that I do not say all marriages are valid where *verba de præsenti* are used. Those marriages only are so where the force and effect of the *verba de præsenti* are to bind the parties by this contract, without reference to, or contemplation of, any future ceremony."

The Supreme Court of Ohio, in Carmichael v. State, quote these remarks of Lords Campbell and Brougham, and then in view of the equivocal nature of the expression "contract of marriage," and the importance of the circumstance of subsequent cohabitation, add: "There must be a contract of present marriage —it must appear that the woman was taken as a wife, and that the man was taken as a husband. The circumstances of publicity in entering into the contract, and of cohabitation thereafter, as husband and wife, are most important to show the intent with which *any words were used*, and without such circumstances, under

the manifest policy of our laws on the subject, and the habits and feelings of our people, an intent to form the honorable relation of marriage could not be properly found." 12 Ohio St. 560. The Court are here speaking of a marriage in form—where "words were used," and such was the particular case before them. And in another part of the opinion they say: "The requisites to constitute a valid marriage, independent of any positive law, have been stated in many authorities, but it must still be a question on the facts of the particular case." Id. 559. Where the evidence is circumstantial, there is proof of a marriage other than a marriage in form. Where the evidence is not circumstantial, but direct, the marriage proved is a marriage in form. A formal contract of marriage, established without help from presumptions, may or may not be a marriage in substance or essence, and in such case "the circumstances of publicity in entering into the contract, and of cohabitation thereafter as husband and wife, are most important to show the intent with which any words were used." Where a marriage in substance or essence is established from presumptions, (such as arise from the parties living together in the way of husband and wife and their acts of a matrimonial character,) of course there could be no "circumstances of publicity in entering into the contract." A manifest distinction exists between the consent itself and the indications or proofs of it.

From this review of the authorities we arrive at the following conclusion:

At the common law, as understood in this country, a contract *per verba de præsenti*, or in the words of the present tense, between parties capable of intermarrying, whereby they agree with each other to live thenceforth their whole lives in the state of union which ought to exist between a husband and his wife, constitutes a valid marriage, without other ceremony, especially when followed by cohabitation.

See Bishop Mar. & Div. § 163 (4th Ed. § 279.)

The element of *permanency* is essential to the contract of marriage. This element was lacking in both of the cases most relied upon by the defendants.

Commonwealth v. Stump, 53 Pa. St. 132, and Roche v. Washington, 19 Ind. 53.

The latter was a case of marriage between a male and female of the *Miami* tribe of Indians according to their customs which allowed the parties themselves to dissolve the marriage whenever they pleased. There was no union of one man and one woman, "so long as they both shall live."

19 Ind. 57.

In the former case, the Court, after reviewing the evidence say: "If the contract be *a mere hiring of a house-keeper*, the adding of concubinage does not make it a marriage. And what more is the proof in this case?"

53 Pa. St. 136.

In another part of the opinion the Court admit that "marriage is in law a civil contract," and may be proved "like all other civil contracts," but strangely assume that all civil contracts must "be proved either by the signature of the parties or by witnesses who were present when it was made." Ibid. We leave it for the defendant's counsel to reconcile, if they can, this *dictum* with the ruling of the same Court in Kenyon v. Ashbridge, 35 Pa. St. 157, where it was held that "to establish marriage in civil cases, other than actions for seduction, the declarations and conduct of the parties are competent evidence."

See also Pettingill v. McGregor, 12 N. H. 184.

Harmon v. Harmon, 16 Ill. 88.

"If parties choose to marry by private agreement, without the interposition of a Magistrate or Christian minister the law does not forbid it. They run great risks in having the nature of the tie suspected, doubted or denied, and deprive themselves of the best and highest proof of their compact, but still the only point after all is whether the contract of marriage existed, and that may be established by the kind of proof applicable to all contracts."

Grotgen v. Grotgen, 3 Bradford, 375.

"If marriage be a civil contract, consummated by the consent of the parties, freely and voluntarily given, the bare fact of its being clandestine, and being entered into and solemnized without the usual requisites to give it publicity, does not *ipso facto* render it void, in the absence of any statutory provision to that effect."

Askew v. Dupree, 30 Georgia, 188.

"The single question in all these cases, is this: Was there a con-

tract between the parties to live together as man and wife? The law does not require to know when and where the agreement was made. Though words of contract *in præsenti* are sufficient no witness is requisite, nor need the time and place be pointed out. Curiosity may be gratified with these details, but justice is satisfied by having the existence of the contract determined."

Tummalty v. Tummalty, 3 Bradford, 372.

II.

PRESUMPTIONS IN FAVOR OF MARRIAGE.

Semper præsumitur pro matrimonio. Every intendment of the law is in favor of matrimony.

1 Bish. M. & D. § 457.

It is the duty of a Court to presume matrimony, where the parties have cohabitated, and there are circumstances from which a contract of marriage may be inferred.

Caujolle v. Ferrie, 23 N. Y. 107.

"The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them."

23 N. Y. 104.

It is a principle of law, nearly if not quite universal, that *Odiosa et inhonesta non sunt in lege præsumenda.*

1 Bish. M. & D. § 434.

Since no man is to be presumed, without proof, to live in violation of law and of the ordinary rules of decency and decorum, the law shall presume every couple who live together in the way of husband and wife to be such in fact. Ibid.

"It is not to be presumed (that) those who hold themselves out in society as man and wife, who are rearing a family of children at their domestic board, to whom the father gives his name, over whom he exercises a parent's authority, and administers a parent's protection and support, are living in open disregard of public morals, and that their common offspring are bastards."

Per Bullard, J. in Holmes v. Holmes, 6 La. 463.

"If the father is proved to have brought up the party as his

legitimate son, this is sufficient evidence of legitimacy till impeached, and indeed it amounts to a daily assertion that the son is legitimate."

Per Mansfield, C. J. in Berkeley Peerage case, 4 Camp. 416.

Kenyon v. Ashbridge, 35 Pa. St. 160.

" The rule cannot be stated too broadly, that the description, " child, son, issue," every word of that species, must be taken, *prima facie*, to mean legitimate child, son, or issue.

Lord Chancellor Eldon, in Wilkinson v. Adams. 1 Vesey & Beame, 422.

" The circumstance of an entry being in a family Bible, to which all the family have access, gives it that *solidity* which it would not have, if made in a book which remained in the exclusive possession of the father. Entries in family Bibles have therefore become common evidence of pedigree in this country (England); and in America where there is no register of births or baptisms, hardly any other is known."

Lord Redesdale, in 4 Camp. 421.

" It is clear both upon authority and upon general principles of public policy and natural equity, that where the legitimacy of children is called in question, * * * * * every reasonable presumption is indulged in favor of legitimacy. *Very slight circumstances have been held sufficient to authorize a Court or jury to find the existence of a marriage.*"

Johnson v. Johnson, 30 Miss. 88.

No authority can be found, on a question of legitimacy, which requires an acknowledged and conceded child, to prove an act of marriage as a requisite to maintain his legitimacy. " The presumption and the *charity* of the law are in his favor; and those who wish to bastardize him must make out the fact by clear and irrefragable proof."

23 N. Y. 108.

" The question of the validity of a marriage cannot be tried like any question of fact which is independent of presumption, for the reason that the law presumes strongly in favor of marriage, particularly after the lapse of a great length of time. * * * * * * * * * * * * * * *

Consequently we are to give greater weight to the presumption in favor of marriage, and to be satisfied with proof of a less decisive character."

23 N. Y. 108-9; 4 Bradf. 86; 1 Bish. M. & D. § 457, and cases cited.

"The presumption of law is not lightly to be repelled; it is not to be broken in upon or shaken by a mere balance of probability; the evidence for repelling it must be strong, satisfactory and conclusive."

Lord Lyndhurst, (5 Cla. & Fin. 163.) quoted in 23 N. Y., 109.

"A presumption of this sort in favor of a marriage can only be negatived by disproving every reasonable possibility." "*You should negative every reasonable possibility.*"

Lord Cottenham, (2 H. L. Cas. 331) quoted in 23 N. Y. 109.

This presumption in favor of marriage is what is called a presumption of fact, not one of law. A presumption of fact may be overthrown by a sufficient amount of countervailing evidence. A presumption of law is conclusive. For this reason in the case of Blackburn v. Crawfords, 3 Wallace, 195, the instruction, that if the facts were as there stated, "the presumption of *law* was in favor of the legitimacy of the children," was held to be erroneous. The Court say: "They might, *by possibility*, all be true, and yet no marriage have occurred." In other words, the presumption was not conclusive.

The presumption of innocence is one which runs through the entire field of our law. "We are to presume against a notorious act of immorality, almost as strongly as we would against the commission of a legal crime."

Starr v. Peck, 1 Hill, 270.

In all cases of conflicting presumptions on the subject of marriage and legitimacy, that in favor of innocence must prevail.

Senser v. Bower, 1 Pa. 450.

Hull v. Rawls, 27 Miss. 471.

Spears v. Barton, 31 Miss. 547.

When the presumption of innocence is brought in to oppose, in a particular case, the presumption of life, it is often found to be the more powerful of the two, and thus to overbear the weaker one. The finding by a jury has been considered just which sustained a marriage entered into after one year's absence of a party to a former marriage. (Rex v. Twining, 2 B. & Ald. 386.) And where the Court below refused to instruct the jury that the death of the

former husband should be presumed at the time of the second marriage, which took place two years after he was last known to be alive, and the jury found against the second marriage, the verdict was set aside and a new trial ordered. (Greensboro' v. Underhill, 12 Vt. 636.) To allow such a verdict to stand would be to establish a crime upon a bare presumption. Courts and juries are always authorized to indulge in presumptions in favor of innocence, but never to presume a crime. For this reason the ordinary presumption in favor of a prior marriage, arising from the declarations and conduct of the parties, will not be entertained in cases where as in Clayton v. Wardle, (4 N. Y. 230,) such presumption, if allowed, would bastardize the issue of a subsequent marriage, and expose the parties to the charge of bigamy. A presumption from circumstances in favor of a prior marriage is neutralized by the presumption against the commission of crime in contracting a subsequent marriage.

But it is alleged by the defendents that cohabitation, illicit in its commencement, is presumed to continue so. This is a somewhat doubtful general statement of the law. And the reason why the proposition is doubtful is, not that it is not in some circumstances true, but that, as a matter of correct legal principle, it is true only in some circumstances, untrue in others. And the cases in which qualifications apply, are probably more numerous than those wherein the unqualified proposition applies.

1 Bish. M. & D. § 506, and cases cited.

It may not be unworthy of passing notice that there is a distinction between a casual act of indiscretion and that habitual intercourse called cohabitation. And when we come to examine the facts in this case we shall endeavor to show that the cohabitation proper—the living together—of Isaac Funk, and the mother of James, at the house of Adam Funk, the grandfather of these parties, was moral and legal from the very commencement—from the very day Isaac brought her there to preside at his father's table, and not only occupy the chair but recently made vacant by the death of his mother, but also to be a companion to his innocent and highly respected sister, who during the very time of that cohabitation, won the affection, and became the honored wife of John Stubblefield, then and always regarded as a man of pure character and sterling integrity.

But conceding for the present that the unqualified proposition, as claimed by the defendants, that cohabitation illicit in its commencement is presumed to continue so, applies to a casual act of indiscretion as well as where the parties cohabit—live together, "yet," as Mr. Bishop concludes after reviewing the authorities, "slight circumstances may show—the slightest ought to be pressed into the service of showing—a change in the mind of the parties respecting such their connection; resulting in the presumption of marriage, though the intercourse was willfully wrongful at first."

1 Bish. M. & D. § 510.

Fenton v. Reed, 4 Johns, 52.

North v. North, 1 Barb. (ch.) 243.

Hyde v Hyde, 3 Bradf. 509.

Tummalty v. Tummalty, 3 Bradf. 369.

Yates v. Houston, 3 Texas, 433.

Ferrie v. The Public Administrator, 4 Bradf. 28.

Caujolle v. Ferrie, 26 Barb. 177.

Same v. Same, 23 N. Y. 90.

"That a fact continuous in its nature will be presumed to continue after its existence is once shown, is a presumption which ought not to be allowed to overthrow another presumption of equal if not greater force, in favor of innocence."

Klein v. Laudman, 29 Misso. 261.

Juries have in some cases been permitted to infer a fact of marriage, celebrated after the death of the former matrimonial partner, though there was no direct proof of such fact, and even though there might be a strong probability that no such fact had really transpired. Where in one case, a woman had entered into a marriage with a man, believing her former husband to be dead, and, her supposed deceased husband returning, still continued to cohabit under the second marriage, and kept up this cohabitation after her first husband really died, a second marriage, after the death of the first husband, was presumed. The Court say: "A jury would have been warranted, under the circumstances of this case, to have inferred an actual marriage. And the Court below had sufficient ground to draw that conclusion, and they have drawn it and their decision being a substitute for a verdict, we will not disturb it."

Fenton v. Reed, 4 Johns, 52.

In another case a man married in Ohio, and nine years afterwards his wife, by his request, left him, went down the river and was never heard from. Some months after her departure he commenced an illicit cohabitation with another woman, moved with her to Louisiana, and thence to Texas, where they lived together in the way of husband and wife for five years, and then he died. The presumption of innocence was held to out-weigh the presumption of the continuance of human life, and a marriage between the parties was presumed, notwithstanding their original intercourse was illicit with the knowledge of both parties. The Court say: "There is no evidence as to the character of their intercourse in Louisiana; but on their emigration to Texas it assumes all the distinctive marks of the matrimonial relation, and the only argument which can be urged against the actual subsistence of the marriage relation, from and after that period, and the innocence of the cohabitation, must be founded on the supposition that, as the intercourse was illicit at its commencement, it must have always so continued. * * * * Let it be admitted that this woman had knowingly wandered from the paths of virtue, and that in the weakness of human frailty she had originally yielded to the arts and seductions of the deceased, yet the conclusion does not necessarily follow that the latter would be unwilling to repair, as far as possible, the wrongs he had inflicted. *

* * * The judgment which would presume that erring humanity would not repent and reform is too harsh to have place in any beneficent system of law, and we cannot yield our assent to any such doctrine."

Yates v. Houston, 3 Texas, 433, 450.

We have stated, for the most part in the language of adjudged cases, the rules by which Courts are guided in examining and determing questions of marriage and legitimacy.

"There are certain legal rules in relation to presumptive evidence which are approved by reason, sound policy, the common sense of mankind, and for the honor of jurisprudence, I may add, charity. They are not accidental rules, but have their basis laid broad and deep in the immutable principles of morality and equity, and their observance is largely condusive to the order, happiness, and welfare of society. There are also degrees in the weight or force of

different presumptions, and here again the law is not so cold, nor so regardless of humanity, as to reject with stoicism the claims of charity and the appeals of helpless orphanage," 4 Bradf. 84.

Even Denio, J. in dissenting from the judgment of the Court in Caujolle v. Ferrie, readily concedes the weight of the presumption in favor of marriage. He says: "It is also true, that the amount of evidence to establish a given position is somewhat in proportion to the consequences which are likely to flow from a particular determination; for no tribunal, for instance, would pronounce a man guilty of a capital offence upon the mere preponderance of evidence which would be sufficient to charge him with a debt; and, in questions like the present, where a judgment in favor of one of the parties would attach the stigma of illegitimacy to another, *the case against him must be of a very satisfactory character.*" 23 N. Y. 139.

"The benevolence of the law is nowhere exhibited more abundantly than in favor of marriage and legitimacy." (4 Bradf. 85.) A presumption of this sort as we have seen, "can only be negatived by disproving every reasonable possibility."

In each case, therefore the practical question is not whether a marriage has been established by a preponderance of evidence or not, but whether upon the proofs and the presumption thus charitably entertained by the law, a jury would find in favor of or against the assumed marriage.

See 1 Bish. M. & D. §432.

In the Ferrie case where the intercourse was originally illicit, and the cohabitation or dwelling together covered a period of only two months, and that the period of necessary confinement from publicity, by reason of the pains precedent and subsequent to child-birth, and there was no record of a marriage, the Surrogate says:

"There are doubts and uncertainties which the candid mind must confess, but are we to indulge these—are we to be astute in spelling out defects and flaws, harboring suspicions, and promoting conjectures, shall the law, with cold and merciless argument, be intent upon following with the probe every humane presumption, and be careful to magnify every opposing fact—against a child claiming his maternal succession, and in behalf of distant colla-

terals? Certainly not. We approach then this question with the well settled rule and presumption of law in favor of marriage and legitimacy, a presumption not lightly or easily to be repelled. The evidence to overcome it must be clear and satisfactory, and irreconcilable with any other hypothesis than legitimacy. There must not be a mere balance of probabilities, slightly preponderating, but the opposing weights must be controlling." After summing up the evidence he concludes: "With all the presumptions of the law in favor of children and their legitimacy to aid these facts, even were the countervailing circumstances stronger, more numerous, and imposing than they are, I should be compelled to find in behalf of the complainant." (4 Bradf. 112, 113).

And this judgment of the Surrogate was sustained not only in the Supreme Court but also in the Court of Appeals of the State of New York.

"It being for the highest good of the parties, of the children, and of the community, that all the intercourse between the sexes in its nature matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all presumptions both of law and of fact, presses into its service all things which can help it in each particular, to sustain marriage, and repel the conclusion of unlawful commerce."

1 Bish. M. & D. § 457.

Having considered what constitutes a valid marriage and the benigg presumptions in its favor, we are now prepared to investigate."

III.

THE FACTS OF THE CASE.

A question of marriage and legitimacy is always deeply interesting, leading to the investigation of the most tender and intimate intercourse of life, laying bare the secrets of the heart, unvailing domestic privacy, and involving relations which lie at the very basis of natural and social right. It concerns our common humanity, for there is no class or condition beyond the reach of occurrences which may call for judicial determination upon the claims of husband, and wife, and children; and there should always therefore be the most grave and considerate care, that in

deciding the particular case in view, the mind should be kept as free as possible from specialties and incline rather to such broad and catholic rules as are adapted to all classes and all cases. from being founded upon the fundamental principles of our nature, and a just view of the constitution of civil society, the rights of its members, and their mutual happiness and well being. (4 Brad. 48.)

Issac Funk, the father of the parties litigant, was born in Clark County Kentucky, Nov. 17th, 1797. In the year 1807, he emigrated with his father Adam Funk to Fayette County, Ohio. His father was wealthy—was known as "the richman," for years, but lost most of his property, by endorsing for others, near the close of the war 1812. (Ev. 109, 110.)

In the year 1816, Edward Stubblefield removed with his family from Halifax County, Virgina to Fayette County, Ohio. An orphan girl, by the name of Prudence Washburn, came with them as a member of the family. She had been raised by the mother of Mrs. Edward Stubblefield, and was regarded and treated by the latter as a younger sister. (1. 8.)

Soon after their arrival in the neighborhood of Adam Funk's, Isaac became acquainted with Prudence or Prudy as she was generally called. The acquaintance resulted in an intimacy and the birth of the complainant, James Funk, at Edward Stubblefield's house, in Paint Township, Fayette County, on the 25th of Dec., 1818. Isaac was twenty one years old on the 17th of the preceding month. (1. 8.) He continued to live at home some two years after the birth of James, i. e. until he was twenty-three years old, when he went to the Kanawha Salt Works, Virginia, and stayed there about ten months, or a year. He then returned to his father's, and lived there until he immigrated to Illinois in the early part of 1824. (4, 110, 2.)

In June, 1820, when James was about eighteen months old, and some six months before Isaac went to the Kanawha Salt Works, Prudy was again with child. She went to John Buck's about the first of October, 1820, (James being two years old the Christmas following) and "lived there as one of the family" till about the first of May following. Her second child, named Mary Ann was born at Buck's house, in March, 1821. (55, 56.)

At the time of the conception of this child Prudy must have

been living either at Jacob Funk's or Charles Vesey's. Jacob was a brother of Isaac and lived about two miles from his father's, and Vesey lived on Jacob's place. The evidence is that Prudy lived "awhile," "a short time" after James was born, at Edward Stubblefield's, then "some months" at Jacob Funk's, then at Charles Vesey's, then "three weeks" at William Hay's in the fall of 1820, and then at John Buck's from the first of October 1820 until after Mary Ann was born. (1, 8, 59). Jane Hays says: "I first knew her in 1820; she spun for us *three weeks* that fall, that was when James was not quite two years old; I never saw her but once afterwards." (59.)

It is most likely that Isaac was the father of Mary Ann. He lived at home and Prudy lived either at his father's house, or on his brother's place only two miles distant, and as yet there was no estrangement between them. He never could have had any doubt upon the subject if he had not been intimate with Prudy about that time. Jesse Funk, Isaac's brother, evidently thought that the girl was Isaac's child, judging from the resemblance to Isaac, having seen her while on a visit at Isaac's after she was grown up. Until after this visit Mary L. E. Barger, the daughter of Jesse, had thought that the complainant was the son of her Aunt Cassandra, the mother of the defendants. A few days after the visit Jesse and his daughter were at Isaac's house and she heard the following conversation:

"After dinner my father and uncle Isaac were standing out on the steps talking. I don't remember anything that was said until my father said to uncle Isaac: 'Ike, don't you think she is Jim's sister—one of your children; too?' And uncle remarked, 'by Christ, I believe she is. * * * And then my uncle Isaac asked my father if she did n't look very much like Jim. His answer was, "Yes, I think she does, and like her mother too.' That is all that I remember that he said at the time. (42.)

The evidence is that James favors his father as much if not more than any of his other children.

Upon cross-examination Mrs. Barger was asked the question: "Have you not always understood from your father and other relatives of Isaac Funk, since the time of the conversation of which you have spoken, that James Funk was an illegitimate son of Isaac

Funk?" She answered, "No, I have always understood that he was not aunt Cassandra's son; never heard the word illegitimate used." (43.)

Whatever Prudie might have said in order to shield Isaac, when one of the "overseers of the poor came to see her about the child, Mary Ann, and wanted to know what she was going to do about it; wanted she should swear the child to the father." She ever after claimed that Isaac was the father of both the children. Andrew Biggs says: "My understanding was that she laid them to Isaac Funk." (79.) Nathaniel Tway, at whose father's house she lived with her two children two months, testifies: "Prudence Washburn said Isaac Funk was the father of both these children —James and Mary, and I dont recollect of hearing anything in those days to the contrary." (66.)

This evidence shows that it is probable that Isaac was the father of Mary Ann as well as of James.

In tracing the history of Prudy we find that while she was living at John Buck's "and before the birth of her second child," under the "advice" of Mr. and Mrs. Buck she swore out a writ for the arrest of Isaac as the father of James. It will be borne in mind that she went to Buck's in October, 1820, a short time before Isaac was twenty three years of age, and consequently before he went to the Kanawha Salt Works. Mrs. Buck says: "Isaac Funk got to hear about it and was angry." (56-7.) Isaac went to Buck's and gave Prudy his note for thirty dollars, (57), and shortly after left for the Kanawah Salt Works and was gone about ten months or a year. The note was given some time between the first of October and the 25th of December, 1820, for James was "some two years" old when Isaac went to the Kanawha Salt Works. (4.) During his absence Prudy lived at Buck's till May, 1821, (55), then at Buck's brother-in-law's, James Thompson's, then at Edward Stubblefield's, and then at Robert Stubblefield's, (2, 8.) She was living at Robert Stubblefields when his first wife died, which was sometime before December, 1821, and remained in his family, taking care of his children, until about a month after his second marriage. (2, 8.) He was married to his second wife, Dorothy Funk, a sister of Isaac's, on the 29th of July, 1822. (16.) It appears therefore,

that when Isaac returned from the Kanawha Salt Works, Prudy was living at Robert Stubblefield's. It was while she was living there that the overseer of the poor wanted her to swear out a writ against the father of the child Mary Ann, and she evaded him by mentioning the name of a person whose whereabouts does not appear from the evidence, and who was evidently unknown to the overseer, as nothing more was ever done about it. When Prudy settled the other case with Isaac, at Buck's, and saw how angry he was, she undoubtedly either promised him or determined in her own mind that she would not swear out a writ against him as the father of this child. At the time he gave the note she had been pregnant about six months.

While Prudy was still living at Robert Stubblefield's, in June, 1822,—Isaac understood that she was about to sue him on the note, and wanted him to pursuade her not to sue him. The next morning Prudy told Stubblefield that she had a note against him, "but had never threatened to sue him." (101.)

At this time and for some time previously—perhaps ever since she had by the advice of the Bucks caused that writ to be issued —there was evidently an estrangement between them. Whatever may have been the cause of this estrangement, the matter was not compromised until she lived for the last time at Edward Stubblefield's. She remained as we have seen at Robert Stubblefield's until about a month after his second marriage—that is, until some time in August, 1822. She then went to Tway's and stayed there from August till the next October, 1822. From Tway's she went to Edward Stubblefield's, the home of her girlhood, and the same month, after having met Isaac, and talked over with him their differences, the past and the future, the poor wanderer was taken to his home there to remain until the shadow of Death fell upon her. (2, 8, 10, 65.)

At this period of time there was a change in the conduct of the parties toward each other. Thenceforward they act as man and wife and their cohabitation assumes the distinctive marks of the matrimonial relation. Had they immigrated to Illinois and lived together here in precisely the same way they lived in Ohio, they would have had with everybody the reputation of being husband and wife. The candid mind upon full consideration of the evidence

must concede this. And can it be for a moment contended that a mere change of locality will change the character of that relation which is founded upon the mutual covenant alone.

We do not claim that these parties ever entered into a formal ceremonial marriage before a minister or magistrate. We do however, maintain that they mutually promised each other to live together their whole lives and discharge to each other the duties of husband and wife. We concede that theirs was an informal, irregular marriage, but still it was as binding as though celebrated *in facie ecclesiæ.*

"To establish marriage in civil cases, other than actions for seduction, declarations and conduct of parties are always admitted." (35 Pa. St. 157.)

"It requires nothing more than the civil consent of the parties, and that consent can be shown the same as any other agreement—by mere words of present contract, by declaration and acts; or by continued course or habit of living, by cohabitation as man and wife, and by reputation." (3 Bradf. 370–1.)

The acts and conduct of the parties and their continued course or habit of living together in the way of husband and wife furnish the highest presumptive proof of an informal marriage.

Prudy commenced living with Isaac at his father's house the "last of October" 1822 (10). During the rest of her life, a period of "about fifteen months" (2)—his acts and conduct toward her show that he fulfilled those obligations of love, respect, fidelity and support which are characteristic of the honorable relation of matrimony.

Elsie Richardson, who lived at Bloomingsburgh, (50) testifies: "The first time I saw them together, I believe it was in 1822; they came to Bloomingsburgh to the store; she bought some things at the store; some little necessaries; I don't know what they were; in '23, in the spring, I saw them going to Washington; went with them part of the way; they bought some things; she bought some things in the store;.....he paid for it both times in the store." "My husband was with me; we first saw them on the road, just beyond Bloomingsburgh, a little bit, they were a little piece ahead of us, going along, and I said to Mr. Haner, I wondered who they were, and he answered me and said

it was Isaac Funk and his wife, or it ought to be; then we got up closer and he looked around and I saw it was really him." "The men's talk was about cattle and hogs, and she and I talked about sickness in the neighborhood, flux had just come around there, and most every one that took it died of it; the men rode together, just ahead of us." "We were married in May, and this was shortly afterwards; Mr. Haner was my first husband." (46-7.)

Nancy Biggs, who lives near Lexington, McLean Co., testifies: "Have known James Funk since he was about 2 years old; I know James Funk's mother. I saw Isaac Funk and James Funk's mother out together, I think it was at old Mr. Seltser's funeral; they had the children with them; preaching was in a grove; I dont know that I seen them come, and dont know how they did come; I saw them pass up to the preaching ground together; they had two children with them, James and Mary Ann; Prudy was carrying Mary Ann; I think Mr. Funk carried James awhile and then let him down and led him; I was taking care of my little brother; they came close to where I was; I knew James and Mary Ann anywhere I saw them;..... ..... I dont remember how long it was before Funk left, but think it was the summer before he left in the winter. Prudy was a tall delicate looking person, black eyes, fair skin, freckled and very neat in appearance; she was good looking; I dont remember when Mr. Adam Funk died; dont remember when Prudy died—the day of the month or the month; it was in the winterr and I was at the funeral; it was about two weeks after Mr. Funk left, I think; it was generally supposed that she had taken cold going into the cellar or smoke house to get provisions for Mr. Funk the night he left; she had been confined about a week or eight days before that time; we heard the child was a boy; the neighbors said she said that Isaac told her before he left to call it Isaac for him."

Cyrus B. Dunkle testifies: "I did see Isaac Funk and some woman come to a church or funeral, or big meeting, of some description; it was in Fayette County, Paint Township, near where Adam Funk lived, at a big school house, near Callender's Mill, on the big road; I saw them come there at that meeting." "My best recollection is, that the woman carried a child in her arms." "I recollect of some remarks, but can't say who made them;.....

the remarks were that it was a strange idea to see Mr. Funk and his wife come out to meeting." (50—1.)

Adam Bennet testifies: "I saw Isaac Funk and James Funk's mother together once in the fall or summer before he left Ohio; I cant say whether I saw Issac Funk's sister with them or not; at that time they came to church together and went away together; it was at the church below Midway." "They went on horseback; I did not see them when they came, but I saw them when they left; Isaac Funk got her horse for her and she got on and I saw them ride away together." (53—4.)

Mary Johnson testifies: "I have seen them together at meetings, but not at parties; it was at the Williams Church near Midway; I cant say how many times, but I saw them frequently at meetings together." "I saw them together at meetings, while they were living at Adam Funk's." "I also saw Isaac Funk's sister and James Funk's mother at meetings during that time several times." "I cant say how James Funk and his wife were treated by Adam Funk and his family; I never heard but what they treated them kindly; I heard Isaac Funk say that James Funk was his son." (64—5.)

James H. Reeves testifies: "I was at a meeting with my uncle and the preacher asked my uncle (where the meeting was) who that was; he said it was Isaac Funk and his wife."....."It was in April, in the year 1823, at Mr. Gosling's on Sunday." (67.)

Mr. Reeves further testifies about seeing Isaac Funk at a camp-meeting in September of that year: "It was at my uncle's tent, or near there; I was with my mother; a man drove up with a wagon and team with a woman and child in; he got out of the wagon near my uncle's tent, and the woman and child with him came to the tent; my uncle spoke to him; this is not the same uncle though that I was with in the spring; my uncle spoke to him, and also to the woman, and then introduced them to my mother; it was Isaac Funk and his wife. He said it was Isaac Funk and his wife." (68.)

The most important testimony in the case is that of Mrs. Martha Dennison. Her plain and simple narrative of the parting interview between these parties, while bearing the impress of perfect truthfulness, give us a clear insight as to the real nature of that

pure heart-union and those heaven-implanted affections which are the growth alone of the sacred relations of husband and wife and parent and child.

Martha Dennison, the cousin of Isaac Funk, was at his father's house when he left for Illinois. She testifies: "I think I had been there one week; perhaps it lacked one day of a week; I was employed there to take care of Prudy, when she had her last babe. Her babe was born at night, and I was taken there next morning. He (Isaac) had gone with a drove of hogs over the mountains, as I understood them, he and his brother Absalom. He did come back about four days, I think; him and Absalom went to Chilicothe; their business was, as they said, to get their money changed, or fixed, so that they could pay their creditors; after they came back from over the mountains they staid at home one day and night, I think, before they went to Chilicothe, and left the same night after they came back from Chilicothe; about two o'clock in the night, I think." "I slept with her (Prudy) myself, as I always do, when I take care of a woman." "I think it was the last of December, or the first of January; it was a cold, damp, rainy night, the night he left." "They bought the drove of hogs they took over the mountains on credit, as I understood; I mean Absalom and Isaac; and they went away without paying for the hogs, as I understood, and when they came back from Chilicothe I knew they were going away by their movements; Isaac said when he went away that he would get so in two or three years that he could live and let live, then he would come back and pay every cent he owed. Prudy got his things ready; he asked her to go and get the things for him; I said to her, let me do what you have to do, for it is misting rain, and you will get your death of cold, and she said to me, they wont let you, for they don't want you to know, and there is nobody that knows anything about the things but me; I asked her if they were not going to go away; she said she believed they were, but did not want me to know; she kept crying all the time while getting their things. I think as near as I can recollect, about two o'clock in the night he came in; I was laying on the bed behind Prudy; she kept crying all the time, and Isaac came in and said, Prudy I'm about to start; says she, you are; he answered, yes; and she said Ike, what do you think *I* will

do ; you are leaving me in a bad fix ; says he, I'm in a bad fix, too ; then he said, I will get so bye and bye I can live and let live, then I'll come back and pay up all I owe ; then, says she, what do you think Jimmy will say when he wakes up and finds you gone, in the morning ; then Jimmy commenced crying ; he was sleeping in another bed close by ; Isaac stooped down and kissed her, Prudy, and walked right to the child, and, says he, Jim, son, what ails you ; and Jimmy says, *you are going to leave me and mother, and what do you think we will do ;* Isaac said to the little boy, you must be a good boy, and when I get so I can live and let live, I will come after you ; and the little boy says, how long ; and he said to Jimmy, in two or three years ; and the little boy says, that is a long while ; and he stooped down and kissed the little boy, and turned round and left in tears, as I judged from his voice and actions ; it was dark ; I could not see, but I knew from the appearance of things he was in distress or tears ; I could not keep from crying myself ; I tried to keep them from knowing that I was awake, I know in reason, they did not know it ; I never saw him afterwards. I asked her the next morning what she was going to call her baby ; she said she was going to call it Isaac ; she told me he wanted her to call the baby for him. The second morning after Isaac left the babe died. I think, as near as I can recollect, she lived about two weeks, and everybody supposed she got her death by being out that night in the mist of cold rain ; she took worse immediately after that and continued to get worse until she died." (1–5.) "I staid with her two weeks, and the old gentleman paid me for it. She (Prudy) says there was a girl named Jerusha Knapp, who wanted a home and offered to stay there and take care of her for nothing, as the old gentleman told me. The old man wanted her because she didn't charge him anything, and the girl did not treat Prudy well, and Prudy complained, and the old man fell out with her on that account, and Prudy wanted me to take care of her and they brought her to father's, and I took care of her until she died. *I never saw a woman die happier.* (8.)

It does seem to us that no one can pause after the perusal of this evidence, and listen to the response of his own heart, without a thorough conviction that these parties had long before mutually

agreed to consider themselves as married in fact. And this by the law of nature, the common law—and the law of Ohio constitutes holy matrimony. *Semper presumitur pro matrimonio*, is a well recognized maxim, and in all cases the presumptions both of law and effect should be carried to the very verge to uphold a marriage, where a permanent, life-long union was meant by the parties.

"The essence of the marriage contract consists in consent. Nature places it upon this pure and simple foundation. Forms are only the external indications of this agreement, and are not requisites to its validity. The ceremony may be expedient and becoming, but adds nothing to the intrinsic sanctity and force of the obligation. Before man it may increase its apparent solemnity, but in the sight of God, the vital power of the institution resides in the mutual covenant simply." (4 Bradf. 88.)

The testimony of Elsie Richardson fully confirms that of Martha Dennison. Mrs. Richardson is now over sixty years of age, and resides "on a farm near Lexington, McLean County, Illinois." She is the same person who saw Prudy buy goods, once at the store in Bloomingsburgh in the fall of 1822, and again at a store in Washington in the spring of 1823, and saw Isaac pay for them both times. We transcribe that portion of the testimony which relates to a conversation she had with Isaac Funk in 1828, after he was settled at Funk's Grove.

"I believe it was in the very latter part of '28; I just happened in to the house; it was late in the evening; we were moving; I went in to buy some butter, I believe was my errand; I was in there a little bit, and we talked a little bit about Ohio people: then he looked up and said, I suppose you know that Prudy is dead; I said yes, I had heard she was dead; he said yes, she was dead and then he said, I suppose you have heard some reports about it: the reports were that she had died of grief; he said it wasn't so; that she had taken cold from confinement, the night they left; that she had got up and went from one room to the other, and it was kind of damp weather, rainy, and they were getting ready to come out here, and he knowed that she hadn't died of grief, for he had calculated to go and bring her out or send for her out here in this State, somewhere, and the children, he

said, (at that time I don't suppose they knew what part of the State they would go to), he would bring her and the children out here." "He said he had told her secretly, and he knew she had not died of grief; he knew she hadn't." "He had told her secretly that he would bring her and the children to this country, and so he knew she hadn't died of grief; it seems as though some one had made reflections that she had died of grief, and he said she hadn't" (47—8.)

Do not the conduct of the parties at their last interview on earth, and the feeling declarations made by him after her "happy" death when "late in the evening" as the emigrant wagon drove up, and he recognized an old acquaintance he "turned and ookedl up and said, I suppose you know that Paudy is dead;" and after a little, affirmed as it were from the depths of his heart that "he knew she had not died of grief—he knew she hadn't," because he had told her that "he would bring her and the children to this country, and so he knew she hadn't died of grief,"———do not this conduct and these declarations furnish, not only the slight evidence which is held sufficient by the wisdom of the law to establish a marriage, but also the clear preponderance of evidence that they had formed that union of one man and one woman "so long as they both should live," which constitutes true marriage? And if by his conduct and declarations and the intercourse between them she was justified in the belief that a permanent, life-long relationship had been agreed upon and mutually understood, there is no principle of sound ethics or of law which will allow any of his heirs to repudiate as against her innocent offspring the legal force and effect of such agrement and understanding. Will the defendants—his own children—say that their father never intended to keep his promse, or that he intended to bring her and children to this country for the sole purpose of gratifying unhallowed lusts? All of the evidence shows that he was a man of "unimpeachable veracity," and one of the witnesses says; "he would not tell a lie to save all the property he had." (34.)

But it may be saidhat this high-minded, honorable man would not marry thiswoman—a woman he loved so tenderly and of whom he always spoke in terms of the highest respect?

Before his marriage to the mother of the defendants, in a conversation with John H. S. Rhodes he "stated: that when he got his affairs fixed he had a boy in Ohio, and was going to fetch him out here at the risk of all hazards..... Then he went on to state that the boy's mother was a small delicate woman, dark hair and dark eyes; *Isaac Funk told me that she was a first-rate woman*" (12.)

Elizabeth Rankin, "a confidential friend" of the mother of the defendants, testifies about a conversation she had with her "about how James' mother looked, and what kind of a woman she was:" "She said she guessed she was *a pretty good kind of a woman;* I do not know where she got the news." (16.)

John L. Myers, in answer to the cross-interrogatory, "was not Prudence Washburn's character for chastity, bad in your neighborhood?" replied. "I know nothing of her chastity, nor was she reputed to be in the neighborhood, a woman of bad character for chastity, except so far as her connection with Isaac Funk." (40.)

Nathaniel Tway testifies: "I don't remember of ever hearing anything disrespectful of Prudy, except with Isaac Funk—the case with him—and I don't think I ever saw anything wrong about her while she lived at our house, as I recollect of." (68.)

Martha Dennison, testifies: "She never kept company with anybody else, nor went with anybody else, and I don't think she went into young company at all." (8.) With Isaac and the children and "frequently" with his sister, she attended church, and camp-meetings and funerals. And Mrs. Dennison says: "I never saw a woman die happier than she did." (8).

Although at times Isaac Funk may have entertained the popular belief that a marriage was not valid unless celebrated in the presence of a minister or magistrate, yet on other and more solemn occasions he seemed to comprehend the true nature of the marriage contract, and not only allowed and sanctioned her introduction to respectable and religious people as his wife, but also unhesitatingly declared that she was his wife.

Rev. Mr. Montgomery, for a number of years a minister of the Methodist Church, and for nine years Judge of the County Court of Boone County, Iowa, testifies: "I recollect particularly one

conversation that I had with Isaac Funk about the complainant, James Funk; this was at a camp-meeting in Randolph's Grove, McLean County, Illinois; I and Isaac Funk were selected as two of the guards to keep down disturbance at the camp-meeting; we were sitting on a log outside of the meeting, and he was talking about his farms and business generally, and spoke of his son James Funk as a good boy to work; I then spoke to him about James being considerable older and larger than the rest of his boys; he then said to me that James was a son of his first wife; I cannot give the exact date of this conversation, but it was while Mr. Chase was Presiding Elder of the Methodist Church in that district; and I should suppose that James was at that time about sixteen or seventeen years of age; I have heard him at one other time state the same things but the time and place I cannot now remember." (89).

To the cross-interrogatory, "Please state whether you are certain as to what Isaac Funk said, and what he meant by it?" he answered: "I am positive that he told me just the words I have stated above, and if he meant anything different from what the words indicate, then I can't say what he meant; I understood him to mean just what he said, and he gave me no reason to believe anything else." (90).

Without quoting from the testimony of Gov. Matteson, it is sufficient to state that on one occasion in the Senate Chamber, at Springfield, Isaac Funk told him that James was his oldest son by a former wife in Ohio.

Years of prosperity and honor passed over the head of Isaac Funk. He was a consistent member of the Methodist Church and had not only the confidence and respect of the community in which he lived, but also a reputation beyond the State for his courage and patriotism. His broad acres, located in the most fertile portion of Central Illinois, were numbered by tens of thousands, and valued at millions of dollars. But honor and wealth are ineffectual to ward off the arrows of death.

Coming to Bloomington during a session of the State Senate, of which he was at the time a member, he was violently attacked with "erysipilas of the face and scalp, complicated with diptheria," and died within a week. Learning of his serious illness,

James came to see him the day before he died. At this time his face and throat were badly swollen, and it was difficult for him to see or speak. It would not be unnatural on this solemn occasion that his mind should revert to his early love and be deeply affected at the presence of his first begotten.

Robert Greenlee says: "James Funk came in, stood by the bedside, where Mr. Funk was lying; he probably stood there five minutes, and then he went to Mr. Isaac Funk; then I think, if I recollect right, Duncan Funk asked his father if he knew who it was; I think Isaac Funk said he did; then Mr. Isaac Funk spoke; "I supposed she was a virtuous woman," and threw his hands upon James' shoulder, and tried to grasp him down, and was crying, and felt very bad, and was excited, as I supposed." "My recollection is, he said it twice." (19.)

The history of Isaac Funk informs us of but two occasions on which this strong man was known to weep; the one was on that cold, misty night, long years ago, in the cabin back in Ohio, when he "stooped down and kissed" for the last time the mother of his first-born child; the other was when with the cold damps of death already upon his brow, he threw his hands upon that same child's shoulder, and tried to grasp him down and repeated those precious words. "She was a virtuous woman—she was a virtuous woman."

This alone is a priceless legacy to the complainant, even though he fail to participate with his younger, college bred brothers, in the enjoyment of that princely fortune to whose foundation his own hard labor in no small degree, contributed.

But it is urged by the defendants that after Wednesday noon Mr. Funk was in a "comatose" condition, and that after Thursday noon he exhibited no evidence of intelligence or reason. Webster's definition of "comatose" is, "preternaturally disposed to sleep."

"Judge David Davis, who saw him repeatedly," says:

"Whenever I saw him he was in his right mind; don't think I saw him the day before his death, but did the day before that: was unwell myself, and would not have gone to see any one but a very particular friend; during his sickness, the erysipilas had closed his eyes, some of the family would tell him who I was, and

we would talk together a little. I do not remember whether or not I had any conversation with him the last time I saw him." And in answer to the question, "Have you any recollection as to the state of his mind, when you saw him last?" He says:

"All I can say about that is, that the idea that he was not in his right mind when I last spoke to him, did not occur to me at all, never thought of such a thing; Dr. H. Noble was there at that time, about the house; I saw Dr. Noble there frequently during the week, and think Dr. H. Noble was there the last time I saw him; I think this was Friday morning." (90.) We have simply to add upon this subject that the words uttered by Isaac Funk could have been suggested only by the presence of James, and as has been well said by another. "He did just the right thing in the right place." Yes, "She was a virtuous woman"—always true to him, and from the time they compromised whatever may have caused their estrangement, and agreed to live together, forever—thenceforth she was his true wife.

But it is contended by the defendants that their grandfather, Adam Funk himself "got her to come" to his house—the home of his innocent, unmarried daughter Tabitha, and the home of his son Isaac—with whom she had already been intimate,—and "paid her" wages as a hired girl.

This rests mainly upon the evidence of Robert Funk. He is the only one that says she was paid, and he testifies "with a halter abomt his neck."

Some years ago when he was very much embarrassed and unable to pay his debts, he made a deed of all his land—400 acres worth $50 per acre—to his brothers Isaac and Jesse; and these defendants have not deeded it back to him, although he has asked them to do so. (96.)

The defendants had his deposition taken twice. He is contradicted by the other evidence in the case in several respects. In answer to the question put by defendants' counsel, upon direct examination, "Did you ever know of Isaac Funk going about in the neighborhood, to church or any other place, with Prudence Washburn while she lived at your father's house?" he promptly swears: "No sir, never did." (95.) In view of the amount of evidence already referred to on this subject, it is unnecessary to characterize such swearing as this.

Upon cross-examination when asked, "Didn't you say in your other deposition, that one of your sisters was not married until sometime after James' mother came to your house to live?" he replies, "Yes, I said that, but I was mistaken, she was not living there when Prudy Washburn came there." (97.)

But John Stubblefield, the husband, says he "was married to Adam Funk's daughter during the time Prudence Washburn lived there." (73.)

In answer to the cross-interrogatory, "Did Isaac Funk while James' mother lived with Adam Funk, call James Funk his son, and treat him as such?" Robert Funk swears: "I never heard him call him so until he went back to Ohio and fetched him back; he had n't anything to do with him while he lived at Adam Funk's." (12.)

Compare this with Martha Dennison's testimony: "Then, says she, what do you think Jimmy will say when he wakes up and finds you are gone, in the morning; then Jimmy commenced crying; he was sleeping in another bed close by; Isaac stooped down and kissed her, and walked right to the child, and, says he, Jim, son, what ails you? and Jimmy says, *you are going to leave me and mother, and what do you think we will do;* Isaac said to the little boy, you must be a good boy, and when I get so I can live and let live, I will come after you; and the little boy says, that is a long while; and he stooped down and kissed the little boy, and turned round and left in tears, as I judged from his voice and actions; it was dark; I could not see, but I knew from the appearance of things he was in distress or tears; I could not keep from crying myself." (5).

And yet Robert Funk swears that Isaac hadn't had anything to do with Jimmy and that Jimmy's mother was simply Adam Funk's hired girl. The child knew better than this. Jimmy and his mother did not look to Adam Funk for comfort and support. The child well knew who was their natural protector—the head of that little family.

We respectfully submit that the testimony of Robert Funk is not worthy of any credence whatever.

But it may be urged that Robert Stubblefield and his wife *understood* that the mother of James was simply Adam Funk's hired

girl. Mrs. Stubblefield states how she "understood it" (8); and Mr. Stubblefield says: "My understanding was that Adam Funk had her hired; I never understood Isaac hired her." (7.) He seemed to infer that Adam Funk must have hired her because he never understood that Isaac hired her.

We claim however, that but little, if any, weight should be given to their testimony upon this subject, for the obvious reason that they were almost entirely ignorant of all domestic affairs and transactions at the house of Adam Funk during the fifteen months that Isaac and Prudy lived there together. Now in the neighborhood "the common report was that Isaac and Abraham had run away and left their debts." (36.) "The report was that Isaac and Abraham left in the night to avoid paying their debts." (40.) "They drove a parcel of hogs, or cattle, and sold them in the East, and then returned and took the money and cleared out with it, and left their creditors to shift the best they could." (45.) "The common report was that they left on account of financial embarrassments." (50.) These and similar statements are testified to by no less than seven of the defendants' own witnesses (53, 64, 68.) Yet Mrs. Stubblefield when asked the question: "Will you tell, if you know, the reason why Isaac left Ohio privately to come to Illinois?" answered, "I do not know." (10.) And Mr. Stubblefield when asked the question: "Did not Isaac Funk leave Ohio for Illinois privately, on account of some pecuniary difficulty?" answered, "He left in the night, I understood, but I do not know for what cause." (5.) He gives further illustration of his ignorance of Isaac's domestic affairs when in answer to the question: "Have you any knowledge from reputation or from Isaac Funk, who was the father of the last child born?" he says: "I have not; I merely know there was a child there." (5.) We leave the testimony of Mr. Stubblefield with the single remark that his "understanding" as to the position Prudy occupied in the family can have but little weight, when he confesses his ignorance as to who was reputed to be the father of the last child born in the family.

The babe was named after Isaac at his request:

Mrs. Dennison, says: "I asked her the next morning what she was going to call her baby; she said she was going to call it

Isaac; she told me he wanted her to call the babe for him. The second morning after Isaac left the babe died." (5.)

He wanted her to call the babe *for him*. Isaac Washburn? No. Isaac Funk.

Andrew Johnson says: "She had three children, James, Mary Ann, and the last one, the babe—I suppose his name was Isaac—*the friends* said he requested that it be named Isaac." (38.) Who were these friends? who, but the Funks and the Stubblefields?

The proposition that Prudy already burdened with the care of two children went to Adam Funk's house and stayed there at his instance as his hired girl, and was retained as such after she was discovered to be pregnant with a third child, is too improbable for human belief.

Adam Funk "was raised from a boy in Virginia, South Bend of the Potomac." He lived for at least ten years—from the birth of Isaac in 1797 to his immigration to Ohio in 1807—in the State of Kentucky. He "was known as the rich man for years, but lost his property by endorsing for others, near the close of the war of 1812." (109, 110.)

There is nothing in the evidence to show that bred as he was and accustomed to the best society, his character was not as honorable as that of Isaac, himself. Looking at the question from a mere pecuniary point of view, it is difficult to conceive why Adam Funk should hire Prudy, encumbered as she was with two small children. Adam Funk had a grown up daughter, Tabitha, and a grown up daughter in those days was generally, fully competent to attend to the household affairs of a family consisting of a father and four sons. Her married sister, Dorothy, says that Prudy "went there the last of October and the next September sister was married." (10).

The third child, Isaac, was born in the latter part of the December following the marriage of Tabitha. Notwithstanding her advanced stage of pregnancy, the hired girl, according to the theory of the defence, was retained. If the work was too much for Tabitha to do alone—if two women were necessary to do Adam Funk's house-work, we would naturally expect, upon the marriage of Tabitha in September—eleven months after Prudy went there—

that he would secure the services of another hired girl. But, unfortunately for this theory, the evidence shows that Prudy was the only woman who lived there from Tabitha's marriage till the morning after her confinement with her last child, Isaac. (1) Isaac and Absalom were at this time over the mountain selling their stock, and Adam Funk got his own niece to come and take care of Prudy, (6)—the hired girl as the defendants claim, the life-long companion of Isaac as we say is abundantly established by the evidence in this case.

The reputation in the neighborhood was that Isaac, not Adam Funk, was keeping her and the children, and that they lived together as man and wife.

Elizabeth Counts testifies: "From common report in my neighborhood, for sometime before Isaac Funk left Ohio, he and the mother of James Funk were living together, and that Isaac Funk was keeping her and the children." (29).

Joseph Counts testifies: "Before Isaac Funk left Ohio, there was a report that James Funk's father and mother were living together, and that he was keeping her; I think it was generally known and understood; it was the common report in the neighborhood." (31).

John L. Myers testifies: "The report in the neighborhood where they lived, was that they lived together at the house of Adam Funk, and cohabited together there as man and wife. at, or about the time said Isaac Funk left the said State of Ohio, and for time before." (38).

Andrew Johnson testifies: "The general talk was that Isaac Funk and her were living, cohabitating together, as man and wife." (38).

And when Isaac left Ohio on account of financial embarrassments, "the people were generally talking that he went off and left *his wife and children;* it went current through the country." (33).

We could readily make other citations in support of this proposition, but without doing so, we think that we do not misrepresent the import of the evidence, when we assert, that leaving out the testimony of Robert Funk, whom we have sufficiently shown to be utterly unworthy of belief, the reputation in that neighborhood

was uniform that Isaac and Prudy were cohabitating, living together in the way of husband and wife. Let us not be misunderstood—we do not claim that the reputation was that they had taken out a license, and entered into a formal, ceremonial marriage before a minister or magistrate, but that they had the reputation of acting and did in fact act toward each other and their children, and the maiden sister, Tabitha, and the brothers at home, and the father, Adam Funk, and the public generally, in precisely the same way they would have acted had they been publicly married in the presence of the whole congregation who were in the habit of attending with them the stated services of the church at Midway. Adam Funk, his daughter Tabitha, his other sons, the church going people of the neighborhood, all well knew and recognized the fact that Isaac and Prudy had voluntarily and forever assumed the relation of husband and wife. It is Isaac—not Adam Funk—who pays for the goods she buys at the different stores in that vicinity. It is Isaac—none of his brothers—who accompanied her to church, and funeral, and camp-meeting, leading or helping her carry the children. Isaac and Prudy are pointed out by the neighbors and introduced by them to their own wives, as husband and wife; and therefore, we conclude, claiming for them, what the law clearly gives, the benefit of every presumption in favor of marriage, that they were married in fact, and that their child, Isaac Funk, by the law of nature, the common law and the law of the State of Ohio, was both begotten and born in lawful wedlock.

If we are warranted in arriving at this conclusion, by the nature of the marriage contract, the essence of which consists in mutual consent, and by the evidence in this case, supported as it is by the presumption charitably entertained by the law in favor of marriage,—a presumption which can be overcome only by evidence clear and satisfactory, and irreconcilable with any other hypothesis than marriage,—then the only remaining question relates to

IV.

THE STATUS OF THE COMPLAINANT.

The law of Ohio previous to the birth of James Funk, (and it has never been changed) is as follows:

"Where a man, having by a woman, one or more children, shall afterwards intermarry with such woman, such child or children, if recognized and acknowledged by him as his child or children, shall be thereby legitimated." Chase's Statutes.

That law is in harmony with the law of Illinois in force for many years before the death of Isaac Funk, and therefore before any rights accrued to the defendants. Our law is as follows:

"If the mother of any bastard child, and the reputed father, shall at any time after its birth, intermarry, the said child shall in all respects, be deemed and held legitimate.

Rev. Stat. p. 86. sec. 7.

See Rice v. Efford. 3 HenMunf. 225;

Story Conflict of Laws. § § 87, 87 a, 93-93 s, 105

Smith v. Kelly, 23 Mississ. 167.

Whatever may be said with respect to Mary Ann, the evidence is uniform and beyond question, that Isaac Funk always "recognized and acknowledged" James as his son.

As soon as he settled in Illinois and had acquired a little means, he went back to Ohio, and, honorable man as he was, paid off his debts and got James declaring that "he intended to treat him as his other children." (41.) In the family bible, "James Funk stands first in the list of Isaac Funk's children, as the son of Isaac Funk." (81.)

Robert Stubblefield testifies: "As far as I know he was treated by the family as one of the family; James worked there as one of the family; he was treated by Isaac Funk and his wife as one of the family; I could see no difference in their treatment, any more than I could see any difference in my own treatment of my children; he was called by his father, Mrs. Funk and the whole family, as James Funk, he remained in his father's family until he was married, when he was about twenty-two years of age, when he became the head of a family of his own; James worked like other boys, and attended to things; at that time Mr. Funk was in moderate circumstances and James worked same as my boys." (6.)

That the social position of James was always as good as that of any of his brothers is evidenced by the fact that he married the daughter of Governor Moore.

Having shown the recognition and acknowledgement of James by his father, it follows that by virtue of the statutes of Ohio and of this State, he stands before the Court in the same position that the child Isaac, would have stood, had he survived instead of James, and been the complainant in this case. The rights of James are to be investigated and determined in view of the same principles and presumptions which would have governed the Court were the legitimacy of Isaac at issue.

With those principles and presumptions in his favor, for the honor of his parents, and for the sake of innocence, of justice, of law, we respectfully and confidently claim a decision for the complainant.